ANNUAL REPORT

for the year ending
March 31, 2002

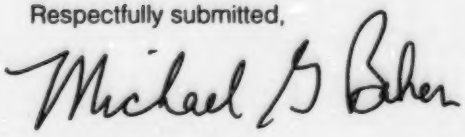
Workers' Compensation Appeals Tribunal

To Her Honour
The Honourable Myra A. Freeman
Lieutenant-Governor of Nova Scotia

May It Please Your Honour:

I have the honour to submit the Annual Report of the Workers' Compensation Appeals Tribunal for the fiscal year ending March 31, 2002.

Respectfully submitted,



Michael G. Baker, Q.C.
Minister of Justice

Michael G. Baker, Q.C.
Minister of Justice

Dear Honourable Minister:

The Workers' Compensation Appeals Tribunal is pleased to present its Annual Report for the fiscal year ending March 31, 2002.

Respectfully submitted,

K Carrigan

Katherine F. Carrigan
Chief Appeal Commissioner

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Year One Post-Backlog: A Time for New Initiatives and for Review

REPORT OF THE CHIEF APPEAL COMMISSIONER

The Tribunal's first full year following resolution of the appeal backlog was successful on many fronts. We were able to ensure that all appeals were heard when participants were ready to proceed and decided within the 60-day period afforded by legislation. The Tribunal remained free of an appeal backlog both during the year and at year-end, having rendered 830 final decisions.

While responding to the interests of appeal participants in receiving timely decisions, the Tribunal also focussed on the task of ensuring that its decisions maintained a high quality standard and that issues of importance to the workers' compensation system were addressed fairly and comprehensively.

In attempting to achieve this goal, the Tribunal observed and applied the guidance we received from the courts on issues such as reconsideration from final decisions of the Workers' Compensation Board; chronic pain; the determination as to whether a right of action is barred; the provision of notice of an accident to the Board; and assessing the credibility of witnesses.

The Tribunal also held a number of panel hearings and released decisions of significance in a several key areas, including chronic pain; shift work maladaption syndrome; the determination as to whether a right of action is barred; the interpretation of "stress" under the *Workers Compensation Act* and the *Government Employees Compensation Act*; and exclusion of witnesses and compelling expert witnesses, among others.

Decision-quality was promoted through regular discussion and review of the more important decisions issued by the Tribunal in each month, as well as by a heightened commitment to the professional development and training of Appeal Commissioners.

It is noteworthy that in 2001–02, the volume of active appeals from Tribunal decisions was significantly reduced. As of year-end, there were only nine active appeals, as compared with 29 appeals at the same time last year. Despite this phenomenon, overall proceedings before the courts remained high, at 244, due to two groupings of adjourned appeals or judicial review applications (See Chart 11 - Appeal Statistics). The matters in question involve chronic pain, on the one

hand, and federal government employers, on the other. The chronic pain proceedings have been adjourned while awaiting the outcome of the appeals before the Supreme Court of Canada on appeal from the Court of Appeal's decision in *Martin v. Workers' Compensation Board (N.S.)* et al., 2000 NSCA 126, while the matters involving federal government employers are adjourned pending the result of an appeal before the Court of Appeal concerning the scope of the *Government Employees Compensation Act*.

Fiscally, the Tribunal met its targets in nearly all budget categories. However, the Tribunal exceeded its total budget authority by approximately $10,000, due to its participation in the Supreme Court of Canada proceedings in *Martin and Laseur v. Workers' Compensation Board (N.S.) et al.*, a matter which was unanticipated at the time the budget was originally prepared in early 2001. Overall, expenditures were reduced by $526,039.40 (31 per cent) from fiscal 2000–01 (See Chart 1 - Budget Expenditures).

Our achievements this year were challenged by both significant increases in appeals and fluctuations in membership. Over the course of the year, the Tribunal received 1006 new appeals—approximately 22 per cent more than last year (See Charts 2A and B - Appeal Statistics). At the same time, our Appeal Commissioner complement diminished from thirteen, at the beginning of April, to nine by mid-August, as Commissioners left the Tribunal to pursue other employment opportunities. The staffing issue was addressed by late October, when four new Commissioners were appointed, following a competition held in August. The new Commissioners were contributing to decision-issuance to the same extent as other Commissioners by the beginning of December, following a period of training, orientation, and mentoring.

Increasing its Appeal Commissioner complement enabled the Tribunal to remain current with an increasing number of appeals. At the end of March, there were 420 outstanding appeals—considered "work-in-progress." These appeals awaited submissions and evidence from appeal participants. Given the increase in appeals received, the number compares favourably to the 330 appeals which remained at the end of last year (See Chart 4 - Appeal Statistics).

The majority of the final decisions released this year—62 per cent—were in relation to appeals received in the year. Nearly all of the remaining appeals were received in 2000–01. Of the pre-2000–01 appeals, four were from the appeal "backlog." These appeals were among the 146 "chronic pain" appeals postponed or adjourned by the Chair of the Workers' Compensation Board under

s.248(1) of the *Act*, in February 2000. The postponement or adjournment was lifted by the Board of Directors in December 2000, following the Court of Appeal's decision in *Martin*. The opportunity provided to the participants to make additional submissions delayed the final resolution of this small number of "backlog appeals" until 2001–02.

Of major importance to the Tribunal's plans for the year was its participation in the statutory review conducted by the Workers' Compensation Review Committee. The work of the Committee engaged the resources of the Tribunal and, in particular, those of the Chief Appeal Commissioner. While awaiting the outcome of the Committee's review, which was delivered to the Minister of Labour at the end of March, the Tribunal postponed other initiatives, such as strategic planning. At year-end, we looked forward with anticipation to reviewing the Committee's Report and hoped that our submissions to the Committee would assist in developing the Workers' Compensation system as a whole.

"The Tribunal's focus in the past year has been on maintaining the appeal management system, developing operational initiatives, and providing assistance to the Workers' Compensation Review Committee in its statutory review of the Workers' Compensation System. Each of these areas has required significant attention on my part as well as time and commitment on the part of WCAT's Appeal Commissioners and staff. The contributions of all of our members and staff are the foundation for the successes we experienced this year."

- Katherine Carrigan, Chief Appeal Commissioner

Operationally, three important initiatives identified in our 2001 Annual Report were developed and supported this year: the management of appeals of WCAT decisions; development of policies and procedures; and the office of Tribunal Registrar. A fourth area, that of the office of Tribunal Research, was ably developed by the Tribunal's Research Officer in the first five months of the year, but has not received attention since the Research Officer's resignation from the Tribunal in August 2001.

In the policy area, the Tribunal completed research and drafting and undertook a public consultation process which resulted in the adoption and application of guideline criteria for the extension of submission and evidence deadlines in paper reviews; the adjournment and postponement of oral hearings; and the extension of time to file Notices of Appeal. Several other Practice Directions already in development are anticipated to be in place by the end of the fiscal year.

The Practice Directions have been of benefit to the office of the Tribunal Registrar in that two of the Registrar's primary responsibilities are to process appeals at the intake level—including determining whether to extend the time to file Notices of Appeal—and to decide requests to extend the submission and evidence periods and postpone oral hearings. (In addition, the Registrar is involved in the oral hearing scheduling process and in the assignment of appeals to Commissioners, along with the Tribunal's Team Leaders.)

The three Practice Directions are intended to encourage fairness and consistency in the Tribunal's practice, and to promote transparency in procedural decision-making in the areas they address. We recognize that these determinations are of the utmost importance to appeal participants and have a major impact on the work of the Tribunal. The introduction of the Practice Directions, along with the consistency, timeliness, and quality enhancement afforded by a Registrar, is a major accomplishment of the Tribunal in the past year.

Apart from the policy project and the development of a Registrar role at the Tribunal, several other undertakings of note were initiated by the Tribunal, or continued from the previous year:

- Written compendia canvassing Tribunal and court decisions in most areas of significance to the Tribunal's work were prepared by Commissioners and presented to their colleagues during the period from November through March.
- The Tribunal's previous decision-header was changed to a decision cover page format in September, following research and consultation with Commissioners and stakeholders conducted by a working group of Appeal Commissioners.
- The time frame for scheduling oral hearings was changed to conform with the time period for conducting paper review appeals, in August.
- The Tribunal began using hearing room facilities at Access Nova Scotia offices throughout the Province, in early 2001.
- Oral hearing scheduling was facilitated through electronic means.
- Discussions were initiated in early 2002 to obtain access to a commercially available, electronic decision-database service.

- WCAT's library resources were re-organized and re-catalogued to conform to the system in use at the Department of Justice Library, beginning in April.

- A working group of Appeal Commissioners tasked with developing a Code of Conduct for Tribunal members was re-instated in February 2001, after a hiatus of several months following membership changes at the Tribunal. The Group is expected to present its results to Commissioners in June 2002.

- A working group of Appeal Commissioners responsible for developing information pamphlets for appeal participants was re-instated in early 2002, after a hiatus of several months following membership changes at the Tribunal.

In addition to its own initiatives, the Tribunal was actively involved in three projects spearheaded by the Workers' Compensation Board: the Electronic Claim File component of the Enterprise Architecture Project; the coordination of appeal issue tracking—also part of the Enterprise Architecture Project; and the Workers' Compensation Advisory Steering Committee.

The Board conducted an "e-file" demonstration for Appeal Commissioners and staff in early January 2002, and "hands on" training was provided to a smaller group of Commissioners and staff later that month, in anticipation of a pilot project to explore the feasibility of adopting the Board's electronic claim file system for use in the appeals process. While originally planned to begin in February or March, the pilot project has been deferred to the fall of 2002, due to the reduced volume of appeals received in the electronic file format.

In a related project, discussions were held between the Chief Appeal Commissioner and the Chief Hearing Officer in the fall of 2001 concerning the development of consistent issue categories and terminology for tracking appeal issues. These discussions are ongoing.

Finally, I note the work of the Workers' Compensation Advisory Steering Committee. This committee was formed in August to oversee a feasibility study for provision of training to injured workers' groups representing workers before the Board and WCAT. The Committee, which included respresentation from the Workers' Advisers Program, the Board, WCAT, and the Cape Breton Injured Workers' Association (CBWIA), recommended, in a report released October 11, that a training program aimed at the specific needs of the CBIWA be developed. WCAT has agreed to participate in developing the program and will conduct some of the training sessions.

The Tribunal's first year post-backlog has afforded an opportunity to introduce new initiatives to improve the quality and consistency of the Tribunal's work, while at the same time maintaining the appeal management processes which have been in place for some time. The coming year should allow these initiatives to be further refined and developed. As we enter the new fiscal year, we anticipate considering and responding to the recommendations of the Workers' Compensation Review Committee, following the Committee's year-long review of the entire system. We also look forward to beginning the Tribunal's strategic planning process with the Committee's comments in mind and to continuing the Tribunal's fundamental work of conducting fair hearings and making well-reasoned decisions on appeal.

Katherine Carrigan
Chief Appeal Commissioner

Tribunal Members and Staff

NEW TRIBUNAL MEMBERS

Gary H. Levine attended the University of Colorado where he received a business degree in 1974 and a law degree in 1977. He went into private practice in Denver from 1977 to 1988 and obtained the designation of Certified Public Accountant in 1980. In addition, Gary lectured at the community college level part-time in various law-related subjects. He emigrated to Nova Scotia and, in 1993, after taking a one-year qualification course of study and articling, was called to the bar in Nova Scotia. Gary practiced law in Nova Scotia with the private bar for several years and, in 1999, was hired by the Worker's Advisers Program. He represented injured workers until becoming an Appeal Commissioner in October 2001.

Michelle Margolian was raised in Digby. She attained her B.A. (Hons) degree in political science from Acadia University and her LL.B. from Dalhousie University. Following her call to the Nova Scotia Bar in 1992, she practiced with the Nova Scotia Department of Justice and a private law firm in Halifax. Michelle was appointed an Appeal Commissioner in August 1999 and was a member of the Tribunal's chronic pain team until her departure in May 2001 for a position with the provincial Department of Justice. Michelle returned to the Tribunal as an Appeal Commissioner in October 2001.

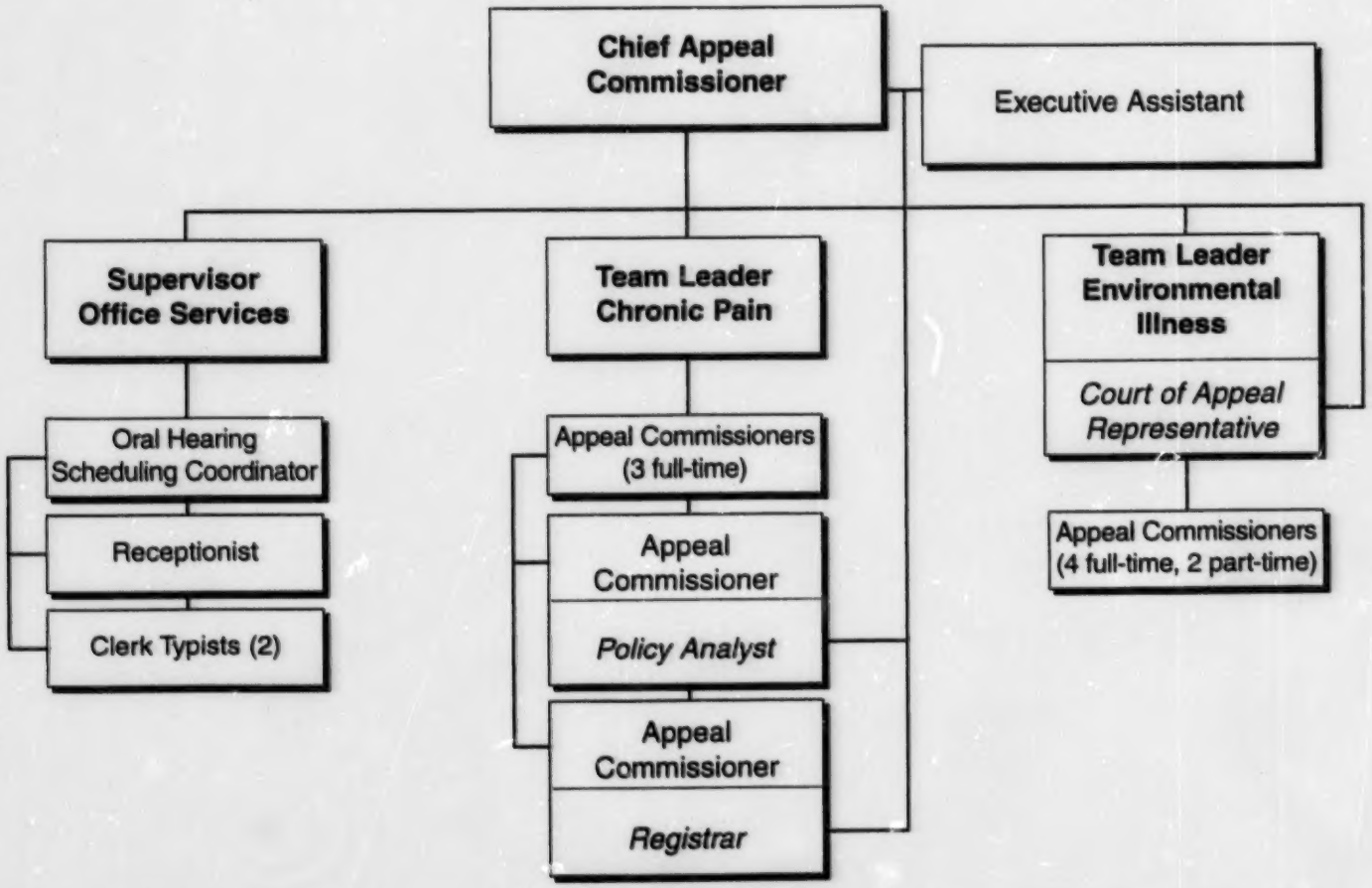
"I've only been with the Tribunal a short while, but I have found the experience rewarding. I see Tribunal members striving toward excellence in their decision-making abilities and it gives me deeper respect for our appellate role. I look forward to my time here."

- David Pearson, Appeal Commissioner

David Pearson grew up in Truro, Nova Scotia, and worked in the post office there for many years before obtaining a Bachelor of Laws degree from Dalhousie University in 1994. He articled in Sydney, Cape Breton, and was admitted to the Nova Scotia Bar in 1995. David practiced law in Halifax before working full-time in the workers' compensation system in 1999, as a Hearing Officer with the Workers' Compensation Board. He joined the Tribunal as an Appeal Commissioner in October 2001.

Brian Sharp grew up in New Glasgow, lives in Halifax, and comes to WCAT from the business sector. His private practice experience focused on litigation, especially family law and child protection. In addition to his law degree, Brian holds bachelors and masters degrees in business. He has volunteered extensively with groups addressing health and community development issues. In August 1999, Brian was appointed a member of the Tribunal and served on the new appeals team until taking a leave of absence to work with the Nova Scotia Human Rights Commission in November 2000. Brian returned to the Tribunal as an Appeal Commissioner in October 2001.

WORKERS' COMPENSATION APPEALS TRIBUNAL
ORGANIZATIONAL CHART 2001–2002



Developments in the Law

CHRONIC PAIN

The past year has been an interesting one for the development of the law relating to chronic pain. The chronic pain team continued to tackle issues of interpretation evolving out of the chronic pain provisions of the Act (sections 10A-10E), and received guidance in their application from several judgments of the Court of Appeal.

Subsequent to the Court of Appeal's decision in *Martin*, and following removal of the Board's postponement of chronic pain appeals in December 2001, the Tribunal resumed the issuance of final decisions in chronic pain cases. It did so in the face of a challenge to the constitutionality of the chronic pain provisions pending before the Supreme Court of Canada and requests to stay appeals before the Tribunal that involved chronic pain. Consistent with the Court's direction, the chronic pain provisions were applied in these decisions.

Perhaps the most significant legal development this year in the area of chronic pain was occasioned by the Court's comments in *Huphman v. Workers' Compensation Board (N.S.) et al.*, (2001), 191 N.S.R. (2d) 384 (C.A.), concerning a worker whose injuries occurred within the "window period" (March 23, 1990 - February 1, 1996). The Court commented that s. 10E (applicable to window period injuries), does not bar a worker from asserting a claim for injuries other than chronic pain in addition to the chronic pain itself.

Until *Huphman*, the Tribunal had interpreted s. 10E as precluding compensation for all injuries arising out of window period accidents leading to chronic pain, as well as those accidents which do not give rise to chronic pain. Following *Huphman*, the Tribunal decided a number of "environmental illness" cases involving workers who exhibited many symptoms and difficulties, including chronic pain, subsequent to alleged chemical exposures. The Tribunal accepted that some of these workers would be entitled to compensation for the non-chronic pain portions of their injuries and allowed the appeals on that basis.

The trend toward narrowing the scope of the chronic pain provisions continued with the Court of Appeal's judgment in *MacKay v. Workers' Compensation Board (N.S.) et al.* 2001 NSCA 67 (April 20, 2001). The Court directed the Tribunal to consider the worker's request for an increase in the permanent impairment award for his back, despite the Tribunal's finding that he suffered from "chronic pain" in

his back. The decision raised the question as to whether a worker could have objective findings accounting for some of his/her pain, for which compensation could be awarded and, at the same time, exhibit chronic pain for which s/he would receive no, or limited, compensation.

A fact situation almost identical to that in *MacKay* presented itself to the Tribunal in Decision 2001-349-AD (December 21, 2001). A panel determined that the worker, who had sustained a back injury in the window period for which he had received a permanent impairment award, also had chronic pain. The panel found that in addition to s. 10E benefits for chronic pain, the worker was entitled to an increase in his permanent impairment rating on the basis of the objective findings present. Decision 2001-349-AD effectively restricts the interpretation of s. 10E such that only the chronic pain aspects of an appeal will be found "null and void."

The Tribunal's reasoning in Decision 2001-349-AD was approved by the Court of Appeal in *Lloyd v. Workers' Compensation Board (N.S.) et al.* 2002 NSCA 18 (February 4, 2002). The Court found that s. 10E of the Act did not operate to bar a worker from asserting a claim for injuries other than chronic pain, in addition to claims for chronic pain itself. In that case the worker had been found to have chronic back pain and be entitled to s. 10E benefits. She was requesting compensation for an elbow injury sustained in the same accident. The Court considered the question as to what types of appeals in s. 10E(c) and (d) would be null and void in the face of a finding of chronic pain. It concluded that only those appeals which "relate to chronic pain only" are null and void. Following the Court's decision in *Lloyd*, an appeal to the Court of Appeal from Decision 2001-349-AD was withdrawn on February 6, 2002.

The Tribunal again had occasion to consider s. 10E of the chronic pain provisions, in Decision 99-1144-AD-CA (February 28, 2002). In that case the Commissioner considered the relationship between s. 10E, which renders null and void any appeal referred to in clause (d) thereof, and s. 10G, which indicates that a worker who is entitled to receive a benefit under s. 10E is also entitled to receive medical aid. The Commissioner concluded that s. 10G is to be applied after entitlement under s. 10E has been established, and without referring back to s. 10E. Further, the worker need not establish that the pain "resulted from" the injury (per s. 102), but only that it "commenced following the injury" (per s. 10E). To require a worker to establish that medical aid is needed as a result of the injury would "open up a causation inquiry not relevant within the context of benefits for chronic pain." The causal connection to be established is between the medical aid requested and the worker's chronic pain.

Another decision which had a significant impact on chronic pain appeals was Decision 2001-83-AD-CA (December 31, 2001). A Tribunal panel determined that s. 10B, which limits benefits for chronic pain, does not apply until the date the worker is determined to have chronic pain. While determining, on the facts, that the worker did not meet the test for TERB between the date of accident and the date his condition was found to meet the definition of chronic pain, the panel concluded:

- There is no requirement in the definition of chronic pain that the pain be permanent; consequently, the worker's recovery from his injuries was not inconsistent with the previous finding of chronic pain.

- "Chronic pain syndrome, fibromyalgia, and myofascial pain syndrome" are specifically included in the definition of chronic pain in s. 10A of the Act. Proportionality of the pain to the injury and normal recovery time need not be considered once it is accepted that the worker has one or more of these conditions.

Given the significance of the issue, appeals potentially raising the same issue were stayed pending the release of Decision 2001-83-AD-CA. Only three appeals were affected by the stay. Since Decision 2001-83-AD-CA, the Tribunal determines the date upon which the worker's chronic pain commenced, where it is relevant in determining the worker's entitlement to benefits other than those relating to chronic pain.

RECONSIDERATION OF FINAL DECISIONS OF THE BOARD

Final decisions of the Board may be reconsidered on receipt of "new evidence," in keeping with Board Policy 8.1.7R1. This policy was the subject of a Tribunal reference to the Chair of the Board, under s. 247(1) of the Act, in late February 2001. The reference was made on the basis that certain questions surrounding the "new evidence" policy should be reviewed by the Board of Directors. The issues referred to the Chair included whether "additional evidence" could be considered, and whether the Board has discretion to reconsider a Tribunal decision under the policy. On April 5, the Tribunal was advised by the Chair that the appeal would not be reviewed by the Board of Directors. While awaiting the outcome of the referral, eight appeals were postponed or adjourned by the Tribunal, in accordance with the Act. These appeals have since been resolved.

Following the referral, the Tribunal received guidance from the Court of Appeal, in *Cherubini v. Workers' Compensation Board (N.S.) et al.*, 2001 NSCA 81 (May 16, 2001) concerning the Tribunal's jurisdiction to adjudicate appeals from reconsideration decisions made under s. 185(2) of the Act. Referring to Board Policy 8.1.7R1, the court stated:

"If the new evidence has met the s. 1.2 criteria and the appeal is allowed from a refusal of a reconsideration, then, subject to further rights of appeal, neither the Hearing Officer nor WCAT have jurisdiction to go any further. The Application must be remitted to Client Services, that is, the Claims Adjudicator, who must conduct a reconsideration pursuant to s. 2(b)."

- Cherubini v. Workers' Compensation Board (N.S.) et al., at paragraph 27

Correspondingly, the Court found that the Board did not have discretion to refuse to apply the policy to evidence presented to it in support of a request for reconsideration.

The Court also noted that WCAT was obliged, under s. 246, to consider any other evidence it may request or obtain. Reconciling the broad jurisdiction under s. 246 with the more limited scope of the "new evidence" policy, the Tribunal, in a subsequent decision, found that "additional evidence" received by the Tribunal during an appeal may be considered under the new evidence policy: Decision 2000-580-AD (June 5, 2001).

While the Court did not assist the Tribunal in determining whether "final decisions" include Tribunal decisions in reconsideration appeals, WCAT has taken the position that its decisions fall within the scope of the "new evidence" policy: Decision 2000-540-AD (April 18, 2001).

FINDINGS OF FACT AND ASSESSMENTS OF CREDIBILITY

In *McCarthy v. Workers' Compensation Board (N.S.) et al.*, (2001), 193 N.S.R. (2d) 301 (C.A.), the Court held that the Tribunal's conclusions as to the credibility of witnesses was not supported by the evidence, and were tantamount to a finding of conspiracy to defraud the workers' compensation system. Further, the Tribunal breached natural justice when it determined the appeal on the basis of the validity of documents which were not contested before the Hearing Officer, without first giving notice that it was considering this issue.

The Court held that explanations given by counsel for the employer, to which the Board did not object, could have been considered by the Tribunal. Likewise, leading questions, to which the Board did not object and which the Tribunal did not correct, could have been considered.

In a concurring decision, Justice Saunders stated that to support a finding of fraud one must have "clear, cogent and persuasive evidence." Saunders, J.A., also cautioned against the use of eye contact in making credibility determinations, as they are "notoriously poor tests of veracity."

"It has long been recognized that the seriousness of the allegation will dictate the sufficiency of proof required to meet the requisite degree of persuasion demanded in a civil case."

- McCarthy v. Workers' Compensation Board (N.S.) et al., per concurring judgment of Saunders, J.A., at paragraph 75

PROVISION OF NOTICE OF ACCIDENT TO THE BOARD

In *Meechan v. Workers' Compensation Board (N.S.) et al.*, 2001 NSCA 124 (September 11, 2001), the Court rejected WCAT's finding that the appellant's claim was statute-barred by s. 83(6) of the Act, which imposes a five year limit for provision of notice of an accident to the Board, from the happening of the accident. The majority held that the applicable legislation is that which is in place at the time of the accident; however, nothing turned on this issue. The majority decision found as a fact that the worker had complied with the notice provision.

The minority, concurring judgment considered that the triggering event in a request for compensation contemplated by s. 82 of the Act is that the worker's claim has come to the attention of the Board. This could occur in one of several ways: the receipt of a Report of Accident by the Board from an individual worker; the receipt of a Report of Accident from an employer; or a medical report or other documentation sent in to the Board by a physician. In *Meechan*, the physician's letters provided the Board with whatever notification it needed to consider the worker's claim for compensation.

The notice requirements, as specified in the minority judgment, were applied in a subsequent Tribunal decision, Decision 2001-514-AD (November 30, 2001).

DISABLEMENT RELATED TO SHIFT WORK

Following a four-day hearing, a Tribunal panel issued Decision 2000-378-AD (January 25, 2002), recognizing that the worker suffered the results of sleep deprivation following a failure to adapt to rotating shift work. In reaching its conclusion, the panel upheld a decision of a Hearing Officer of the Workers' Compensation Board, but on different grounds. The Hearing Officer had found that the worker's disablement was his underlying medical condition—"shift work maladaption syndrome"—while the WCAT panel found that the disablement was the worker's cognitive deficits or symptoms themselves, which included insomnia, lack of concentration, and sleepiness.

The panel accepted that a worker is disabled from work when he or she is in a real danger of injury due to the severity of symptoms, which it found to be the case in the particular appeal. Further, the panel held that while almost all rotating shift workers experience, from time to time, symptoms related to their work, most workers can adapt. The panel concluded, however, that "the worker's case is the rare one where symptoms are severe enough to be, at times, disabling."

A decision of the Nova Scotia Court of Appeal–*Metropolitan Entertainment Group v. Durnford et al. (2000)*, 188 N.S.R.(2d) 318 (C.A.)—was applied by the panel in reaching its conclusion regarding causation of the worker's symptoms. *Durnford* had found a casino blackjack dealer disabled due to lateral epicondylitis, which the Court accepted was a work-related disability.

"The Panel disagrees with the submissions that the Worker need prove that his shift-work maladaption syndrome was caused by work. Durnford states that a Worker need only prove that she or he had symptoms severe enough to cause disablement which arose out of and in the course of employment ... It is not necessary for this Panel to probe deeper and find the underlying medical reasons why the Worker developed disabling symptoms under the same conditions that may not have rendered other workers disabled. The cause of the Worker's shift-work maladaption syndrome is not relevant to the determination of eligibility for compensation under the Act."

Decision 2000-378-AD, at pages 16-17

Decision 2000-378-AD has been appealed to the Nova Scotia Court of Appeal. A hearing to decide leave to appeal is anticipated in June 2002.

DETERMINATIONS AS TO WHETHER RIGHT OF ACTION IS BARRED

In *Queen Elizabeth II Health Sciences Centre v. Workers' Compensation Appeals Tribunal (N.S.) et al.* (2001), 193 N.S.R. (2d) 385 (C.A.), the Court overturned a Tribunal panel's decision sustaining a civil action against several medical professionals and a hospital for allegedly negligent medical treatment following a workplace injury. The Court considered it "patently unreasonable" to find that the term "surgical medical"—an excluded industry under the Act's General Regulations—applied to the activities of the physicians and physiotherapists who were servants and agents of the hospital. The panel had found this aspect of the "operation of hospitals," was carved out from coverage. The following conclusions were reached by the Court:

- Considering the legislative history of ss. 29 and 256 of the Act, there existed a right of appeal to the Court of Appeal despite s. 29(4), which purports to make the Tribunal's decisions in this area "final and conclusive."

- The right of appeal is on questions of jurisdiction, only; consequently, the Tribunal's decisions must be "patently unreasonable" to be overturned.

- The panel's decision that an employer may be subject to the Act in general terms and, at the same time, not subject to the Act on a case-by-case basis, was patently unreasonable. This conclusion made the Act "unworkable."

- The Court rejected the Tribunal's conclusion that finding an employer covered by the Act and therefore immune to suit will depend on the nature of the activities of the employer's servants and agents which give rise to a cause of action.

- WCAT's interpretation unreasonably confused the question of whether an employee is a "worker" with the question of whether an employer is subject to the Act. "Workers," who are covered by the Act, should be distinguished from the broader class of "servants and agents," who may not be covered.

- WCAT's interpretation was "fundamentally at odds with a core principle—the historic trade-off—of the workers' compensation scheme." (paragraph 39). The Court considered it unfair that the hospital would be required to pay large premiums under the Act, yet could be subject to suit from covered workers in some cases.

"With guidance from the courts, the Tribunal continues to develop the law in areas of significance to workers and employers alike. Tribunal decisions interpreting law and policy in relation to chronic pain, reconsideration, the bar to right of action, extended earnings replacement benefits and stress, are of particular note. Consistency in these and other areas is an important goal for the Tribunal."

- Katherine F. Carrigan, Chief Appeal Commissioner

Several Tribunal decisions were rendered during the year in applications under s. 29 of the Act. In two of the applications, the s. 28(2), "use or operation of a motor vehicle" exception to the statutory bar was considered.

Injuries sustained by a worker who was trapped between a loading ramp and the tailgate of a truck while loading cylinders onto the truck were found not be actionable, in Decision 2001-294-TPA (November 19, 2001). The accident occurred on the premises of a third party employer, and the Commissioner found that no motor vehicle belonging to the assessed employer or its employee was involved. The accident arose out of and in the course of employment, and did not arise out of the "use or operation of a motor vehicle." The Commissioner also considered that if the assessed employer had been found liable it would not benefit from either the statutory bar in the workers' compensation context or from its mandatory motor vehicle insurance. Such a result would be "jarring," given the historic trade-off.

In Decision 2001-458-TPA and 2001-435-TPA (March 25, 2002), a Tribunal panel found that the toppling over of a 50-ton carrier which was capable of being driven to a work site but, once there, was stationary while working as a crane, did not involve the "use or operation of a motor vehicle." Consequently, the exception

to the statutory bar did not apply. The panel found that s.28(2) of the Act aimed to create an exception to the bar in those instances where an employer would benefit from mandatory motor vehicle insurance. The determination that the crane fell outside of the "motor vehicle" exception was based on a consideration of the two-part test in *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 404, stated as follows:

- Did the accident result from the ordinary and well-known activities to which automobiles are put?

- Is there some nexus or causal relationship between the injuries and the ownership, use, or operation of the motor vehicle, or is the connection merely incidental or fortuitous?

The panel also applied *F.W. Argue Ltd. v. Howe* (1969) SCR 354, to the effect that the purpose for which the "multiple purpose" or "multiple use" machinery is being used is determinative of its status as a motor vehicle.

In Decision 2001-105-TPA (September 18, 2001), the worker was injured in a single-vehicle accident, while driving home from an employer-sponsored golf tournament held for the employer's customers. A panel found that the worker, who was intoxicated at the time of the accident, was acting within his employment; the action was therefore barred under s. 28 of the Act. The golf tournament was found to be "reasonably incidental" to employment, as was the worker's drinking, and his driving, on the day in question. Further, the drinking was not such as to take the worker outside of the scope of his duties.

"The most striking aspect in becoming an Appeal Commissioner is to learn how humbling an experience it is to decide appeals affecting people's lives. Sometimes it can be a struggle. I often look over at a quote I cut out from Aristotle, 'For the things we have to learn before doing them, we learn by doing them.'"

- Gary H. Levine, Appeal Commissioner

EXTENDED EARNINGS REPLACEMENT BENEFITS

A number of decisions considered the timing and scope of the Board's review of extended earnings replacement benefits (EERB), under s. 73(1). For example, in Decision 2001-311-AD (September 27, 2001), the Tribunal held that neither s. 73(1), nor the applicable Board policy—Policy 3.4.2—precluded a review of EERB entitlement before expiry of the 36-month period where EERB had not previously been awarded. Decision 2001-361-AD (October 30, 2001) held that where the initial EERB decision was based on a misrepresentation of fact, review could take place at any time in accordance with s. 73(1)(d). The Board had taken Employment Insurance (EI) benefits into account in determining the worker's

estimated potential earnings assessment, despite the fact that the worker was ineligible for EI for reasons communicated to Board at the time of the original EERB calculation.

In Decision 2001-41-AD (October 31, 2001) the Tribunal found that nothing in the Act or policies prevented it, in a "thirty-six month" review, from revisiting the issue as to whether specific employment was "suitable and reasonably available" despite the absence of evidence of changed circumstances.

The factors to be considered in determining whether specific employment was "suitable and reasonably available," for purposes of EERB entitlement, were considered in Decision 2001-747-AD (February 27, 2002). The Commissioner held that where the worker was in receipt of Canada Pension Plan disability benefits, the eligibility requirements that a worker be "unable to pursue any substantially gainful occupation," and that the qualifying disability be "severe or prolonged," were relevant.

STRESS

Several decisions in the past year have considered the scope of the statutory definition of "accident" as it pertains to the exclusionary definition of "stress." Section 2(a) of the Act excludes stress other than an "acute reaction to a traumatic event." The decisions note that it was the legislature's intent to limit eligibility for benefits in stress-related situations.

In Decision 2001-255-AD (December 17, 2001), the Commissioner held that stress due to harassment by co-workers or, indeed, "the general stresses of [the] employment situation," is generally not compensable according to the definition of accident in s. 2(a). Further, even if the aggravation of a pre-existing stress-related condition were compensable, the aggravation would have to flow from an acute reaction to a traumatic event, or perhaps specific traumatic events. This was not the case in the particular circumstances of the appeal.

"Without defining the exact parameters of the words "acute reaction to a traumatic event," those words do not contemplate a stress or emotional reaction to the job as a whole over a period of time, including workplace harassment by a co-worker or co-workers over a period of time."

Decision 2001-562-AD (December 17, 2001)

The treatment afforded "stress" under GECA—which contains no exclusionary provision—has also been considered. In Decision 2000-698-AD (June 29, 2001), the Commissioner denied an employer's appeal from recognition of a stress claim under GECA, relying on the following test set out in an earlier panel decision of the Tribunal:

- Does the evidence establish that the worker sustained a psychological injury?
- Did the workplace contribute significantly to the development of the psychological injury?

In Decision 2001-208-AD (December 31, 2001), by contrast, the worker's concerns about potential harassment from a co-worker were found not to constitute "personal injury by an accident," per s. 4 of GECA. Applying the same test as in Decision 2000-698-AD, the Commissioner considered that the worker's decision to stay off work for two weeks was a labour relations issue, more properly dealt with under the collective agreement or under the applicable occupational health and safety regime.

OTHER DECISIONS OF NOTE

- **finality of WCAT decisions:** In Decision 2001-793-AD (February 28, 2002), a previous WCAT decision rejecting a specialist's recommendation for an increase in permanent medical impairment was considered binding on the Commissioner since " an application for an increase in a PMI rating pursuant to s. 71 does not involve a re-litigation of the original award; subsequent decision-makers are bound by the final determination already made in the administration of the matter ... [The decision] was not appealed and therefore the determinations found therein bind the participants and the Tribunal in this appeal."

- **exclusion of witnesses and compellability of expert witnesses:** Decision 2000-504-PAD, et al. (January 31, 2002) addressed two preliminary issues arising in eight environmental illness appeals scheduled to be heard together over a two-to three-week period. The panel held that the eight worker/appellants, each of whom was to testify, should be excluded until each had given testimony, recognizing that this was an exception to the general common law position with respect to the exclusion of parties.

  The panel also found that an expert whose report had been tendered into evidence should be made available for cross-examination. The panel had received, a few days before the planned commencement of the hearing, a television program transcript which arguably raised issues of credibility of the expert, particularly with respect to the manner in which his report had been prepared. The panel concluded that the issue could not adequately be dealt with by way of written representations, holding that to refuse to allow cross-examination would be a denial of the workers' right to a full hearing.

- **deterioration in hearing following removal from noise:** A reference to a Hearing Officer of the Board was made in Decision 2001-497-RTH (December 11, 2001), where medical opinion evidence had been provided by the worker contradicting the Board's evidence that hearing will not deteriorate following removal from a noisy environment. Several other references to Hearing Officers have since been made in appeals raising the same generic medical issue.

- **health care services:** In Decision 2001-571-AD (December 27, 2001), the Commissioner found that homeopathic treatments could be covered by the Board in view of the evidence supporting the positive treatment effects for the worker and the absence of evidence addressing the Board's Policy 2.3.1 criterion. Policy 2.3.1 requires that the "health care" in question be "consistent with generally accepted practice within the health care community."

"...I must apply the Board policy which requires the Board to only provide medical aid which is consistent with generally accepted practice within the healthcare community. The Board has no discretion to provide treatment which is considered experimental by the medical community."

- Decision 2001-164-AD (June 28, 2001)

Decision 2001-164-AD (June 28, 2001), on the other hand, found, that "photonic stimulator" treatments were not "generally accepted practice within the healthcare community" since evidence had been lead supporting the conclusion that they were an "experimental medical treatment." This decision has been applied consistently in subsequent Tribunal decisions dealing with photonic stimulator treatments.

- **standard of review of discretionary decisions:** The standard of review of a Board decision concerning vocational rehabilitation benefits was determined to be "correctness" and not, as held in previous Tribunal decisions, "reasonableness": Decision 2001-503-RTH (February 14, 2002), applying *Cherubini v. Workers' Compensation Board (N.S.) et al.*

"The Tribunal could not perform its duty if the Hearing Officer could pre-empt the statutory appeal function by rendering a decision that was erroneous but not patently unreasonable, or even simply unreasonable. The Tribunal is required by s. 246(1) to decide the appeal, in accordance with the Act, regulations and policies and on evidence and submissions similar to those available to the Hearing Officer. By clearest implication, this requires a fresh and independent adjudication unfettered by a duty of deference to the Hearing Officer, except with respect to deference arising from any fact-finding advantage enjoyed by the Hearing Officer.

- Cherubini v. Workers' Compensation Board (N.S.) et al., at paragraph 51.

- **survivor benefits:** The Court of Appeal, in *Bauman et al. v. Nova Scotia (Attorney General) et al.*, (2001) 192 N.S.R. (2d) 236 (C.A.), overturning a decision of the Supreme Court of Nova Scotia, upheld the constitutionality of the Act's survivor benefits provisions as they relate to widows in receipt of a survivor pension before April 17, 1985, who remarried before that date. Leave to appeal to the Supreme Court of Canada was denied in 2001. The Court of Appeal's decision is of particular relevance to the Tribunal in that Decision 97-1030-TAD (September 26, 2000), applied the judgment of the Supreme Court of Nova Scotia. Decision 97-1030-TAD was appealed to the Court of Appeal and has since been remitted back to the Tribunal, by Consent Order, on February 4, 2002. The appeal will now be re-heard in light of the Court of Appeal's pronouncements on the law.

  In Decision 2001-476-AD (November 14, 2001), s. 187—the standard of proof provision which requires evenly balanced possibilities to be resolved in the worker's favour—was found to be applicable to a survivor benefits claim.

- **"in the course of employment":** In Decision 99-1134-CA-RTH (June 27, 2001), the Commissioner found that a miner who acted as a "draegerman" in a mine rescue operation for another employer was not acting "in the course of his employment" for his own employer. The worker was neither under the "control" of his employer at the relevant time, in that he was away from the employer's premises, nor was he performing work for the employer's benefit. The worker's entitlement to benefits would, however, be covered by the terms of ss. 2(ae) and 8 of the Act relating to workers involved in rescue operations and temporary hire situations, respectively.

Appeal Management

APPEAL INTAKE PROCESS

The position of Tribunal Registrar was formally introduced in April 2001. The Registrar is instrumental in three key areas of Tribunal appeal management: intake, assignment and scheduling, and adjournment and postponement of appeals.

The appeal intake phase, which begins with receipt of the Notice of Appeal and extends to the determination of mode of hearing, setting of submission and evidence deadlines, and preparation of summaries of the appeals, consumes the majority of the Registrar's time. Appeals are processed on approximately a weekly basis, and assigned to Appeal Commissioners monthly. In the appeal intake phase, the Registrar performs the following specific functions:

- reviews all Notices of Appeal and accompanying Hearing Officer decisions
- considers requests to extend the period to file a Notice of Appeal
- responds to inquiries of appellants and potential appellants, as needed
- determines when an appeal cannot be opened due to non-compliance with the statutory appeal provisions
- conducts a preliminary classification of all appeals received
- determines whether appeals will proceed by paper or oral hearing and provides reasons for the determination in letters to appeal participants, subject to reconsideration on receipt of additional information
- sets deadlines for provision of submissions and evidence in appeals, consistent with standard periods developed by the Tribunal
- prepares summaries of pertinent information concerning appeals received, based on a review of the Notice of Appeal, Hearing Officer decision, and worker's claim file

In evaluating appeals at the intake stage, the Registrar performs a preliminary classification assessment and identifies individual appeals as either "chronic pain," "environmental illness," "assessment," "employer appeal from worker claim," or "other." The classification assigned is subject to change following the Appeal Commissioner's consideration of the evidence and submissions in the appeal. Appeal Commissioners perform a thorough determination of issue categories at the conclusion of each appeal, once a decision is rendered.

It appears that Tribunal appeals have increased in complexity in the past year. Together with an increase in participation by employers and the significant number of self-represented workers, a growing number of oral hearings and panel hearings has resulted. The Tribunal's Registrar has found it helpful to conduct pre-hearing conferences in many of these cases in order to assist the participants in selecting a date for hearing, and to determine the nature and quantity of evidence, the number and type of witnesses, and the anticipated length of the hearing.

In addition to her day-to-day work, the Registrar, together with the Policy Project Team, developed criteria leading to the introduction of the Tribunal's Practice Direction concerning Extension of Time to Appeal, in mid-January 2002. Since implementation, the Registrar has been guided by the criteria set out in the Practice Direction in responding to requests to extend the time period to file Notices of Appeal. Written responses are issued in all such cases and the Practice Direction criteria are referenced.

"The Registrar role has proven to be a challenge over the past year, particularly as on a part-time basis, the demands of the position have to be balanced against the demands of the role of Appeal Commissioner. The parameters of the role continue to be developed and refined."

- Leanne Rodwell Hayes, Registrar

In the coming year, we anticipate exploring the means by which issue tracking can be refined and expanded during the intake phase and issues identified on intake coordinated with those identified following the issuance of final decisions. Coordination with issues tracked by the Board in its claims and appeals processes will also be pursued.

APPEAL STATISTICS

Over the past year, 1006 appeals were lodged with the Tribunal, as compared with 781 appeals the year before. Appeal volumes have ranged from 70 to 100 per month; the median and the average number of appeals received being approximately 84, as compared with an average of 65 in 2000–01. This represents a 22 per cent increase over fiscal 2000–01. (See Charts 2A and B - Appeal Statistics).

The vast majority of Tribunal appeals this year, as in past years, were taken by injured workers. Seven hundred and ninety-five of the 830 decisions rendered in the year—or 96 per cent—in fact, resulted from appeals launched by workers or their representatives. Two per cent were employer appeals of worker claims, and only one per cent were employer assessment appeals. Workers were represented by the Workers' Advisers Program in 555 of these appeals (69.8 per cent) and by other representatives in another 77 appeals (9.7 per cent), leaving workers to conduct appeals on their own behalf in about 21 per cent of cases. (See Charts 9 and 10 - Appeal Statistics)

Thirteen issue-based categories were reflected in 1191 individual issues, comprising most of the 830 final decisions rendered this year. Nine issues were related to employer assessment appeals, arising out of four issue-based categories. On a percentage basis, the most common issue in decisions flowing from appeals brought by injured workers was permanent impairment, whether as a request for a permanent impairment award or an increase in existing permanent impairment ratings. This issue arose approximately 29 per cent of the time in worker appeals, followed by new or additional temporary earnings replacement benefits at 23 per cent, and medical aid at 18 per cent of all issues on appeal. Only 2 per cent of the issues in decisions from worker-initiated appeals were classified as involving "chronic pain" (See Charts 5 and 6 - Appeal Statistics).

Of the approximately 830 appeals which proceeded to a final decision in 2001-02, the majority—62 per cent—were in relation to appeals received in the past year (See Chart 4 - Appeal Statistics). About 30 per cent of the appeals resolved had been granted an oral hearing, with the remainder proceeding by paper review. This is generally consistent with the previous year, in which 25 per cent of appeals proceeded by oral hearing although, as noted above, a trend toward more oral hearings is in evidence. Of note is the fact that of decisions rendered in the year, in approximately 46 per cent of the cases where oral hearings had been requested oral hearings were granted. This compares with 37 per cent in the previous year (See Charts 8A and B - Appeal Statistics).

APPEAL ASSIGNMENT AND SCHEDULING

The Registrar's role in the appeal assignment and scheduling process is primarily one of liaison and support. The following specific elements are characteristic of the Registrar's role in this phase of the appeal process:

- reviews appeals available for monthly assignment with Chief Appeal Commissioner, noting issue trends, appeal complexity, and unique issues or arguments ("File summaries" are used for this purpose).
- tracks volume of appeals available for assignment and communicates with Chief Appeal Commissioner concerning the correspondence of appeal volumes with monthly decision-targets for individual Commissioners
- assists the Team Leaders in the assignment of appeals to Commissioners
- liaises with the Scheduling Coordinator for purposes of scheduling oral hearings
- assists the Scheduling Coordinator in assigning additional appeals to Commissioners following the adjournment or continuance of appeal hearings

The appeal assignment process takes into consideration appeal classification and anticipated complexity in order to achieve the goals of "issue streaming" and equitable workload distribution amongst Commissioners. Issue streaming involves the assignment of appeals classified in a preliminary manner as "chronic pain" and "environmental illness" to the respective teams primarily responsible for rendering decisions in these areas. File summaries prepared by the Registrar are used by the Team Leaders in effecting the assignments. The summaries, together with an identification of the Commissioners to whom the various appeals are assigned, are circulated to all Commissioners in order to facilitate consultation on the legal issues which arise.

Preparation of "file summaries" may be enhanced in future through reliance on the Board's Electronic Claim File system. In January and February of this year, the Registrar was engaged in the initial orientation process by which the Tribunal was introduced to the Board's system.

During the year, the Registrar was also involved in assisting the Tribunal's Scheduling Coordinator to develop effective scheduling practices and communication with appeal participants. The scheduling process evolved through several forms. Initially, the scheduling of oral hearings was conducted by manual circulation to Workers' Advisers of the lists of appeals available for oral hearing, along with a blank calendar on which hearings were to be entered by the Advisers. Desire for a more efficient process lead to the development of an electronic scheduling system.

The electronic scheduling system was introduced in September, on a trial basis. An electronic calendar was posted on the Tribunal's website and Advisers were asked to schedule hearings, on-line, within the one-month time frame identified by the Tribunal for this purpose. A list of the hearings available for scheduling was also posted. WCAT staff provided instructions for, and demonstrated the usage of, the system and were available on a consultation basis to assist with problems as they arose. Unfortunately, technical and other problems have limited the usefulness of the electronic scheduling system.

As an alternative, a hybrid approach was taken several months after the electronic system was introduced. This approach allows Advisers to access lists of appeals and the scheduling calendar, both electronically and manually, and to contact the Scheduling Coordinator or, in some cases, the Registrar, by telephone, e-mail, in person, or via the calendar itself, in order to schedule hearings.

ADJOURNMENT AND POSTPONEMENT OF APPEALS

Together with the Policy Project Team, the Registrar developed criteria leading to the Tribunal's Practice Directions concerning Extensions of Submission/Evidence Deadlines, and Postponements/Adjournments of Oral Hearings. These Practice Directions were formally implemented in mid-January 2002. The Registrar's responses to such requests routinely reference the Practice Direction criteria, and templates and protocols have been developed to facilitate the prompt processing of "extension" or "adjournment" requests. Before their introduction, the Registrar used similar criteria in determining whether to grant requests to extend submission and evidence deadlines or to adjourn/postpone oral hearings.

Requests for extensions and postponements number approximately twenty per month. Of these, only 15 per cent are usually denied. The number of monthly requests made has only been tracked since January 1, 2002; a longer time frame will be required to accurately predict any trends. Based on the data acquired in the last three months of the fiscal year, approximately 20 per cent of appeals received per month are effectively postponed or adjourned by request of one or more of the participants—usually the Appellant. Outstanding medical evidence is the most prevalent reason for the request.

Appeals and Judicial Review Proceedings from WCAT Decisions

In the past year, the number of appeals to the Nova Scotia Court of Appeal and the number of decisions released by the Court from the Tribunal's decisions declined significantly in all but two distinct categories.

The Court released ten decisions on the merits pertaining to Tribunal matters: six appeals were allowed and four were dismissed. A number of appeals were resolved by Consent Orders remitting the appeals to the Tribunal (or to the Board) for reconsideration. Three such appeals were remitted directly to the Board and eight appeals were remitted to WCAT. One additional matter was remitted to the Tribunal, by consent, in a judicial review proceeding before the Supreme Court of Nova Scotia (See Chart 11 - Appeal Statistics).

By March 31, 2002, nine appeals that did not involve the application of the chronic pain provisions remained outstanding before the Court of Appeal.

At the end of March 31, 2002, there remained two large groupings of adjourned proceedings before the Court of Appeal and the Supreme Court, respectively. These proceedings involved, on the one hand, Tribunal decisions which applied the chronic pain provisions and, on the other, Tribunal decisions in which the employer was subject to the *Government Employees Compensation Act* (GECA).

Nearly all of the Tribunal's decisions involving the chronic pain provisions (apart from two decisions applicable to workers injured during the "window period") have been appealed to the Court of Appeal. As of March 31, 2002, there was a total of 182 chronic pain proceedings before the Court of Appeal. The Court has set these matters over to June 23, 2003, pending the decision of the Supreme Court of Canada in *Martin*. It is expected that the Supreme Court of Canada's decision in *Martin* will address the constitutionality of s. 10B of the Act and the FRP Regulations—provisions on which the outcome of the adjourned appeals were decided by the Tribunal. In a small number of cases—those involving employees subject to GECA—applications for judicial review have also been filed in the Supreme Court of Nova Scotia.

A second group of proceedings has been adjourned pending decisions from the Court of Appeal in *Cape Breton Development Corporation v. Harold Burrell, WCB*

and WCAT CA 161056 and *D'Arcy Thompson (deceased) v. WCAT, WCB and Cape Breton Development Corporation* CA 169867. These decisions are expected to deal with the interpretation of GECA in relation to federal govenrment workers' appeal rights from WCAT decisions.

The specific issue raised in *Burrell* and *Thompson* was considered by the Court in an earlier decision—*Salloum v. The Nova Scotia Workers' Compensation Appeals Tribunal and the Workers' Compensation Board of Nova Scotia*, 2000 NSCA 148 (December 28, 2000). That decision held that the right of appeal under s.256(1) of the Act is an additional right not provided for in GECA. In view of its finding, the Court in *Salloum* concluded that it did not have jurisdiction to deal with appeals from GECA-based decisions. The *Burrell* and *Thompson* appellants have asked the Court to reconsider *Salloum*.

Both *Burrell* and *Thompson* were heard by the Court in September 2001 and, as of March 31, 2002, decisions had not yet been rendered. While awaiting the outcome of these decisions, the courts have continued to adjourn proceedings which involve GECA.

As of March 31, 2002, there were 50 adjourned proceedings before the courts from GECA matters. These proceedings included appeals to the Court of Appeal and judicial review applications before the Supreme Court. The majority of the appeals involve the chronic pain provisions, while the majority of the judicial review applications are duplicates of appeals begun in the Court of Appeal to preserve the appellants' rights of appeal, pending the decisions in *Burrell* and *Thompson*. Of the 50 adjourned matters, it is estimated that seven of the Court of Appeal matters and three of the matters before the Supreme Court will proceed in some manner once the adjournments are lifted, as they do not appear to involve issues of chronic pain.

The appeal before the Supreme Court of Canada in *Martin* is of particular note in view of the Tribunal's involvement in the proceedings during the past year. Leave to appeal was granted by the Supreme Court of Canada in June. Apart from the issue as to whether certain of the chronic pain provisions are contrary to s. 15 of the *Canadian Charter of Rights and Freedoms* and, if so, whether they are saved by s. 1 of the *Charter*, the Court is expected to consider the Tribunal's jurisdiction to refuse on *Charter* grounds to apply the provisions in question. In view of the significance of the latter issue, WCAT filed a Notice of Intention to Participate in the appeal, which was uncontested.

On February 20, 2002, we filed a Notice of Application for Leave to Cross-Appeal (and Request for Extension of Time), to change our status from that of a Respondent in the appeal. As of the end of March, we continued to await the outcome of that application. On March 12, the Tribunal filed a factum, addressing the jurisdictional question only. In accordance with a Notice of Hearing filed by the Appellants in March, we anticipate that the appeal will be heard during the fall 2002 session of the Court.

Development of Practice Directions

In April 2001, the Tribunal launched its policy development project. The goal of the project was to develop policies dealing with a wide range of subject matters with a view to

- informing appeal participants about the Tribunal's policies and procedures
- providing a fair, open, and understandable process for participants
- assuring the timeliness of the appeals process and avoiding unnecessary delay
- promoting consistency in the Tribunal's decision-making
- assisting the Tribunal in fulfilling its statutory mandate

This initiative is being spearheaded by Appeal Commissioner Michael Hadskis, who is designated as the Tribunal's Policy Analyst. He is assisted by Appeal Commissioner Alexander MacIntosh.

The preliminary stages of the project involved consultations between the Tribunal and persons within the public sector who have experience and expertise in developing and implementing policy instruments. These consultations assisted the Tribunal in formulating an appropriate policy development process. Commissioners Hadskis and MacIntosh also completed a project management course early in the life of the project. This was of assistance in facilitating the creation and execution of a work plan, given the scope of the project and the significance of its deliverables.

The policy development process began with internal discussions between the Policy Analyst, Chief Appeal Commissioner, Registrar, and Appeal Commissioners about problems/opportunities encountered by the Tribunal that potentially called for the implementation of policies. The discussions explored whether policies offered a viable means for dealing with the problems/opportunities, whether alternatives to policy instruments were preferable, and the implications of any policies that might be developed. These discussions ultimately led to the identification of the following areas for policy development:

- extensions of time to appeal
- the composition of hearing panels
- determination of mode of hearing
- time periods for the scheduling of paper reviews and oral hearings
- postponements/adjournments of oral hearings
- extensions of submission/evidence deadlines
- waiver of full participant status
- the conduct of oral hearings
- summonses
- the impact of participants' failure to attend oral hearings

It was expected that the policies dealing with these subjects would take the form of "Practice Directions" that would be made available to all appeal participants and the general public. The list of potential policies was not considered to be exhaustive as it was anticipated that other areas for policy development would emerge over time.

In January 2002, the Tribunal was pleased to be able to implement and publish Practice Directions dealing with the following subjects:

- requests to extend the 30-day time limit to appeal decisions of Board Hearing Officers to the Tribunal
- requests by participants to postpone oral hearings that have not commenced or to adjourn hearings after they have begun

- requests to extend the deadlines set by the Tribunal for the receipt of written submissions and/or evidence from participants before conducting oral hearings and paper reviews

These policies went through a number stages of development before they were finalized. The developmental process included background research and liaisons with other administrative tribunals in Canada, including Ontario's Workplace Safety and Insurance Appeals Tribunal. An extensive review of similar policy instruments from other tribunals was carried out. Legal research was also conducted respecting jurisdictional issues and the criteria for decision-making. On completing the background research, draft Practice Directions were generated and revised after undergoing several stages of internal consultation.

"The launch of the policy development project marked a significant step forward in the Tribunal's continuing commitment to provide a fair, open, and understandable appeals process for its stakeholders. The Tribunal's collaborative approach to policy development continues to facilitate the achievement of those goals. I look forward to the challenges and opportunities the project will offer in the coming year."

- Michael Hadskis, Policy Analyst

Following internal consultation, the draft Practice Directions entered the first of a two-stage external consultation process. The first stage consisted of a plain language review that was carried out by Communications Nova Scotia, Editorial Services. The second stage involved soliciting stakeholder input. Michele McKinnon, Communications Director, Department of Justice, offered her assistance in helping to design a comprehensive stakeholder consultation process.

A mailing list generated by the Workers' Compensation Review Committee was used to identify and contact a substantial number of stakeholders, including various workers' and employers' groups and trade unions, the Workers' Advisers Program, and the Workers' Compensation Board. In November 2001, over one hundred stakeholders were provided a copy of the draft Practice Directions and afforded three weeks to comment on any aspect of the Practice Directions, including their understandability, fairness, completeness, and format.

After considering the feedback received from a small number of stakeholder-respondents, the draft Practice Directions underwent a final round of internal consultation before they received the Chief Appeal Commissioner's approval and were implemented. The Practice Directions are published on the Tribunal's website: www.gov.ns.ca/wcat.

The Tribunal will, on an ongoing basis, evaluate and monitor the effectiveness of its Practice Directions in meeting its goals. Work on the remaining Practice Directions is well underway. The Tribunal hopes to be able to implement the remaining Practice Directions within the next year.

Professional Development and Training

The professional development and training of both Commissioners and staff received high priority this year. Highlights of the activities in this area included the Chief Appeal Commissioner's attendance at the first international conference of the Canadian Council of Administrative Tribunals (CCAT), in June, along with a fellow Appeal Commissioner. The conference was preceded by two meetings of the heads of workers' compensation appeal bodies throughout Canada—a welcome opportunity to liaise with colleagues facing similar issues and problems. Acquaintances formed during these meetings were renewed during the year as issues in common arose. Future meetings are planned to coincide with the annual CCAT conferences.

Other professional development activities undertaken by Commissioners included attendances at the annual conference of Occupational and Environmental Medicine Association of Canada in late September; the Canadian Institute for Administrative Justice annual conference in October; the Canadian Bar Association Administrative Law Conference in November; Nova Scotia Continuing Legal Education Labour and Employment Law Conference; Canadian Institute, Advanced Administrative Law and Practice Conference, in December; and freedom of information and privacy seminars in February and March.

Two Commissioners attended a week-long advanced training course in ADR, in Toronto, in February, and another Commissioner participated in the year-long Middle Manager leadership development course offered by the province. Two of WCAT's staff have also taken part in other phases of the leadership development course offerings, and WCAT's Supervisor of Office Services took part in a three-day course, in March, dealing with the budget-setting process.

Looking Ahead: Developing and Meeting Tribunal Goals in 2002–03

As we prepared for the review to be conducted by the Workers' Compensation Review Committee early in the new fiscal year, it became apparent that the Tribunal's strategic planning efforts might benefit from the Committee's comments and recommendations. As a consequence, we deferred the Tribunal's formal planning process until the spring of 2002.

Strategic Planning

Our goals for the coming year include the creation of mission and vision statements for the Tribunal, the identification of strategic goals, and the preparation of a focussed action plan. In order to achieve these objectives we have set aside two days in June for the entire Tribunal to begin the strategic planning process, and have secured the assistance of Department of Justice Human Resources Consultant Barbara MacKeigan to facilitate our efforts. Following the two-day planning session, we hope to be able to devote the time needed during the year to more fully develop and refine our shared plan.

In the absence of a coordinated strategic plan, a number of operational goals have been identified for the coming year, flowing from projects already underway at the Tribunal. Other goals have emerged as a result of our experiences, including the Tribunal's involvement in the workers' compensation system review, over the past year. At this point, the following major goals and projects have been identified:

Tribunal practice directions

The work of the Policy Project group, originally planned to conclude in 2001–02, has been extended to fiscal 2002-03, due to deviations from the group's work plan resulting from the increased numbers of appeals this year and the need to devote time to submissions to the Review Committee. Areas on which the policy team will focus in the coming year include the development of Practice Directions for determining mode of hearing in appeals, guidelines for Commissioners in the conduct of oral hearings, and criteria for providing employers with copies of Board claim files in appeals, among other areas.

Office of the Registrar

The Registrar role has proved to be of significant value to the work of the Tribunal. However, there has been little time to review and evaluate the scope of the role, for purposes of developing and refining it. Increases in the number of appeals received, requests for adjournments/postponements of oral hearings

and paper reviews, and increases in the number of oral hearings themselves, have left the Registrar with limited time for reflection on the role itself. In addition, the focus on pre-assignment file preparation has been time-consuming and challenging to achieve on a part-time basis.

We hope to streamline the Registrar's role by making more efficient use of internal resources, such as coordinating the Registrar's functions with those of the Tribunal's Scheduling Coordinator. Some of the Registrar's time may be devoted to consultation with other workers' compensation appeal bodies across the country regarding the appeal intake and scheduling process in those jurisdictions. The identification of appeal issue tracking criteria as a project goal may also involve the Registrar's resources.

Electronic Claim File

It is anticipated that the "e-file" pilot project will begin in the fall of 2002. A test group of four Commissioners and one support staff will attempt to decide appeals using the Board's claim files electronically, rather than in print form, in order to determine the efficacy of the e-file system for use in the Tribunal's hearing and decision-making processes. Commissioner Sandy MacIntosh is coordinating the Tribunal's participation in this project.

Each Commissioner in the pilot group will be provided with at least three electronic appeals per month, over a two-to three-month period, in order to establish an adequate basis for evaluating the system. The details of the project's scope and relevant parameters remain to be developed, in consultation with the Board. We look forward to partnering with the Board on this important initiative, which will affect most aspects of the Tribunal's functioning.

Code of Conduct for Appeal Commissioners

In February, Commissioner Michelle Margolian assumed the role of coordinating the development of a Code of Conduct for Tribunal members, assisted by three other Commissioners. The working group expects to present the results of its work to the Chief Appeal Commissioner in late May, and to circulate a draft Code to Tribunal members in June, followed by a planned discussion session with Commissioners later that month.

The adoption of a Code of Conduct is expected to enhance the Tribunal's accountability to appeal participants and to create a consistent standard for our conduct in all facets of the Tribunal's work. Its introduction will also serve to bring the Tribunal in line with many of our counterpart agencies across the country.

Information Pamphlets

During the past year we began developing information pamphlets for appeal participants. With changes in membership and the demands on decision-issuance, there was a need to extend the project into the new fiscal year. Headed by Commissioner Andrea Smillie, the project will entail the creation of at least two "plain language" appeal pamphlets for circulation to appeal participants. The first pamphlet, presently in draft, will provide a general overview of the appeal process and the means by which an appeal may be lodged with the Tribunal. A second proposed pamphlet will explain the oral hearing process. In the course of preparing these documents, we expect to review all of the Tribunal's communications with appeal participants, including standardized letters and documents. The preparation of appeal pamphlets provides an opportunity to improve, integrate, and coordinate all of our communications with appeal participants.

Library and Research Resources

The Research Officer role, as envisioned and described in our 2000–01 Annual Report, has remained vacant since August. Renewed efforts to manage the creation of tribunal headnotes and both the headnote and decision databases will be made in the coming year. In addition, enhancement of the Tribunal's research resources is an important goal. In this respect, we will continue to expand the Tribunal's reference materials, treatises, and on-line databases, in coordination with the resources available through other library facilities.

Appeal Issue Tracking

Appeal issues-tracking is an ongoing project for the Tribunal. Over the past year the Chief Appeal Commissioner and the Chief Hearing Officer of the Board entered into discussions with a view to creating consistent and detailed appeal codes for tracking the issues which arise in appeals. We hope to resume these discussions in the coming year. A unified system of appeal codes, used by both the Internal Appeals level and WCAT, will allow for more meaningful and complete statistical analyses throughout the appeal system. Detailed and consistent issue tracking will permit the Tribunal to cross-reference appeal outcomes and to contribute to transparency and accountability in the appeals system.

Refining and Tracking Performance Management

Participation in the workers' compensation review process during the past year has emphasized the need for identification and tracking of Tribunal Performance Measures in a more consistent and detailed manner than has previously been done. For example, the Tribunal has placed minimal attention on "time to decision," the average life-span of an appeal, cost per decision, and interjurisdictional comparisons in areas such as appeal acceptance and overturn rates. Additionally, comprehensive performance measures to track our compliance with statutory requirements such as the 60-day period for decision issuance have not yet been developed.

Performance measures for Appeal Commissioners have been in place since April 1999; however, these measures also require review to evaluate their validity and effectiveness, post-backlog. The anticipated report from the Review Committee provides an opportune time to begin to develop more comprehensive Tribunal Performance Measures and to evaluate our existing Performance Measures for Appeal Commissioners.

To contact the Workers' Compensation Appeals Tribunal,

write:

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5151 Terminal Road
Halifax, NS B3J 2V9

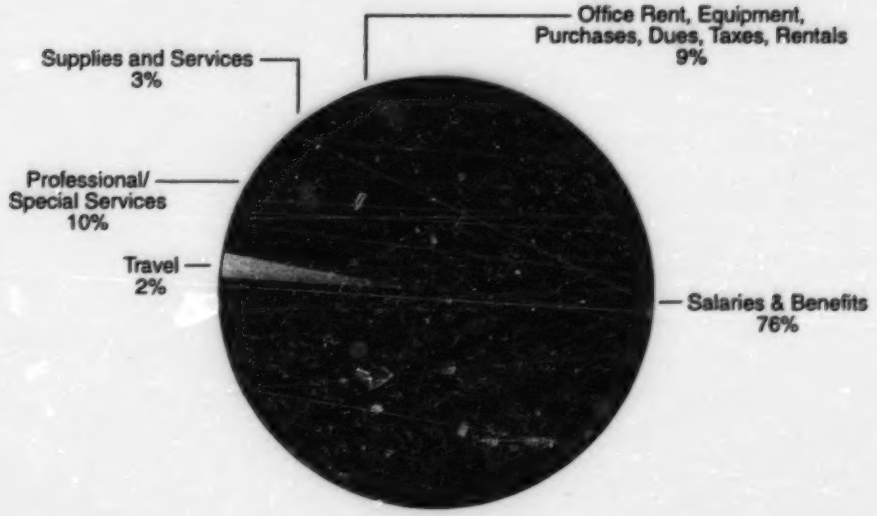
telephone: (902) 424-2250
or toll-free in Nova Scotia: 1-800-274-8281
fax: (902) 424-2321

Budget Expenditures for the Fiscal Year Ending March 31, 2002

CHART 1A

	Authority	Final Forecast	Actual Expenditures
Salaries & Benefits	$ 924,500.00	$ 908,200.00	$ 912,527.76
Travel	$ 18,000.00	$ 39,600.00	$ 28,891.03
Professional/ Special Services	$ 70,800.00	$ 95,800.00	$ 116,946.85
Supplies & Services	$ 41,000.00	$ 47,400.00	$ 40,412.53
Office Rent, Equipment Purchases, Dues, Taxes, Rentals	$ 135,100.00	$ 124,600.00	$ 113,711.72
Sub Total	$ 1,173,400.00	$ 1,187,400.00	$ 1,212,489.89
Less Recoveries			$ 28,959.70
Total	**$ 1,173,400.00**	**$ 1,187,400.00**	**$ 1,183,530.19**

CHART 1B


Office Rent, Equipment, Purchases, Dues, Taxes, Rentals 9%
Supplies and Services 3%
Professional/ Special Services 10%
Travel 2%
Salaries & Benefits 76%

Appeals Received

CHART 2A

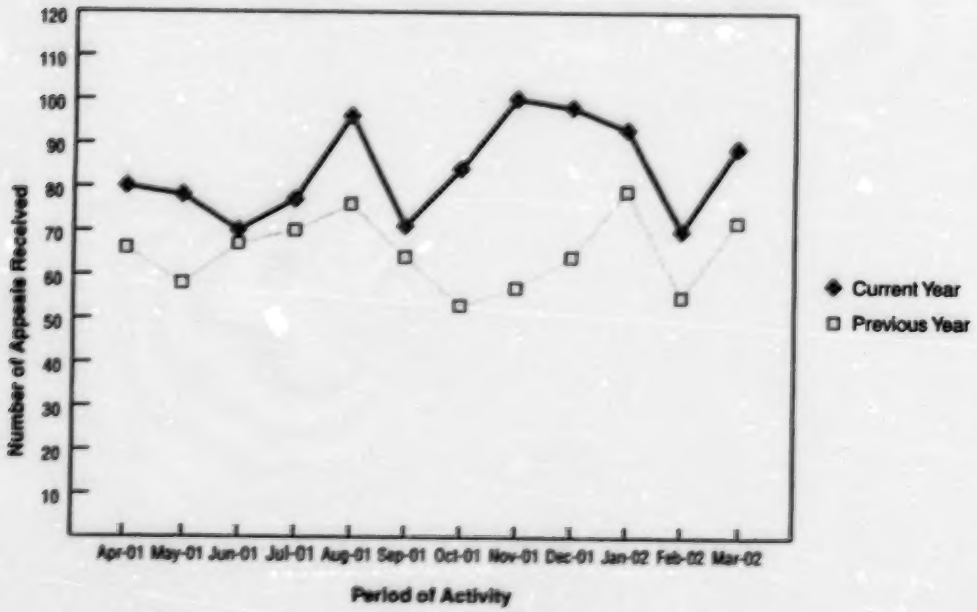
	Previous Year	Current Year
April	66	80
May	58	78
June	67	70
July	70	77
August	76	96
September	64	71
October	53	84
November	57	100
December	64	98
January	79	93
February	55	70
March	72	89
TOTALS	**761**	**1006**

Average number of appeals received monthly (2001–02) - 84

Average number of appeals received monthly (2000–01) - 65

Percentage increase in appeals received over previous year - 22 per cent

CHART 2B



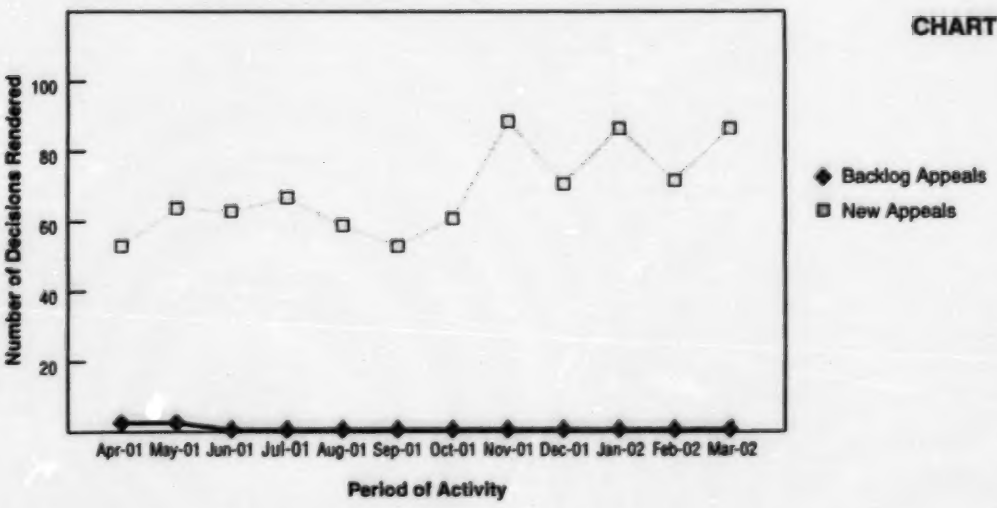
Final Decisions Rendered

CHART 3A

	Backlog Appeals	New Appeals	Total
April 2001	2	53	55
May 2001	2	64	66
June 2001	0	63	63
July 2001	0	67	67
August 2001	0	59	59
Sept. 2001	0	53	53
Oct. 2001	0	61	61
Nov. 2001	0	89	89
Dec. 2001	0	71	71
Jan. 2002	0	87	95
Feb. 2002	0	72	72
March 2002	0	87	87
TOTALS	**4**	**826**	**830**

Average number of decisions rendered per month - 69

CHART 3B



Appeals Outstanding by Year Received

CHART 4 **Appeals Outstanding**

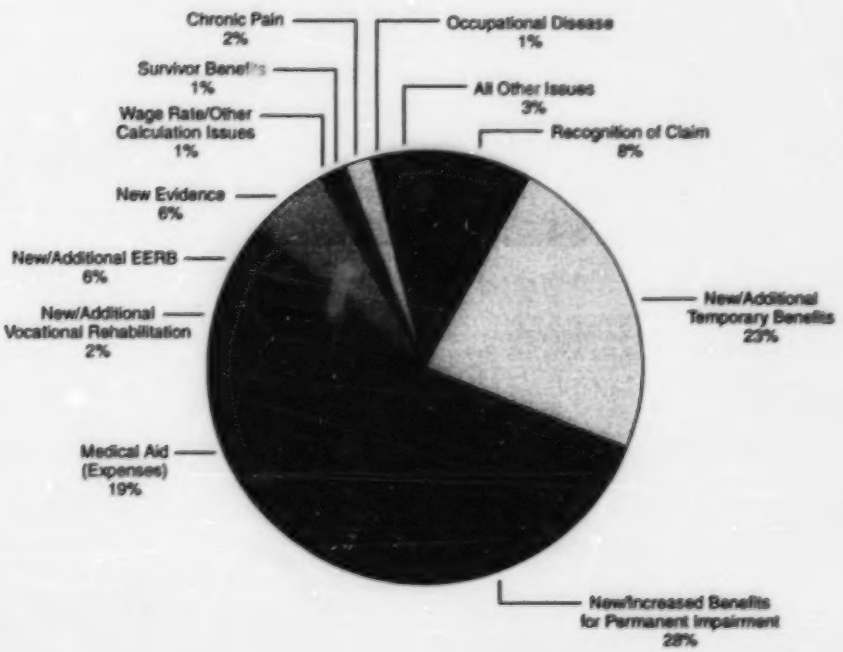
Year Received	April 1, 2001 (Previous Year)	March 31, 2002 (Current Year)
1996-99	2	0
1999-2000	6	1
2000-01	322	13
2001-02	0	406
Total	**330**	**420**

Decisions by Issue Categories: Worker Initiated Appeals

CHART 5A

Recognition of Claim	95
New / Additional Temporary Benefits	281
New / Increased Benefits for Permanent Impairment	345
Medical Aid (Expenses)	226
New / Additional Vocational Rehabilitation	18
New / Additional Extended Earnings Replacement Benefits (incl. Estimated Earnings Capacity)	71
New Evidence	69
Wage Rate / Other Calculation Issues	10
Survivor Benefits	10
Chronic Pain	21
Environmental Illness	0
Occupational Disease	11
All Other Issues	34
Total of all Issue Categories	**1191**

CHART 5B

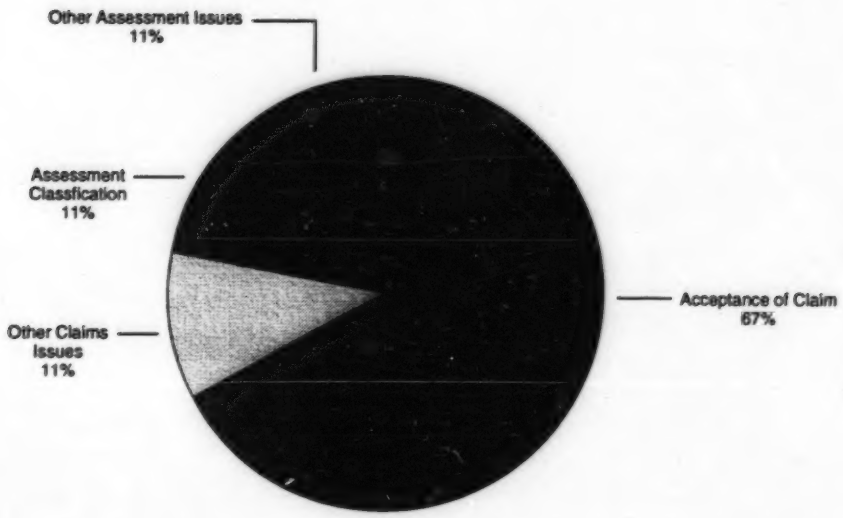


Decisions by Issue Categories: Employer Initiated Appeals

CHART 6A

Acceptance of Claim	6
Extent of Benefits	0
Assessment Classification	1
Assessment Penalties	0
Other Claims Issues	1
Other Assessment Issues	1
Total of all Issue Categories	**9**

CHART 6B



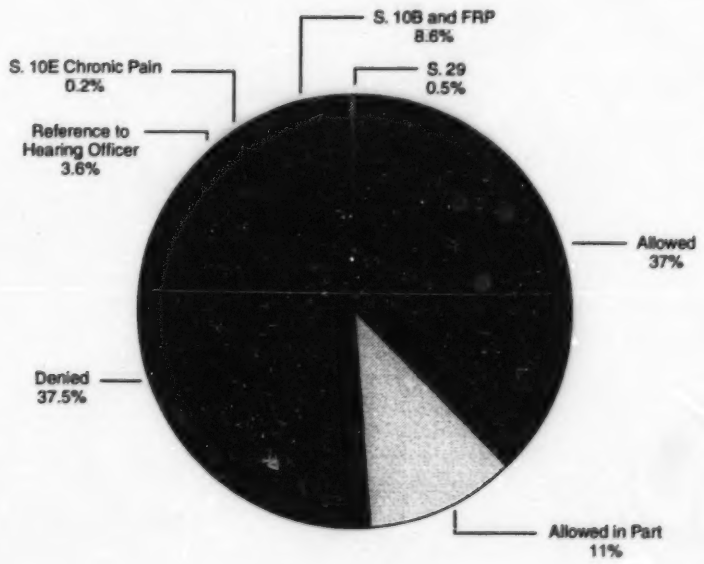
Decisions by Appeal Category and Outcome

CHART 7A

	New Appeals	Backlog Appeals	Total Decisions by Outcome
Final Decisions			
Allowed	307	0	307
Allowed in Part	105	0	105
Denied	311	1	312
s. 10E (Chronic Pain)	2	0	2
s. 10B and FRP	69	2	71
s. 29	4	0	4
Reference to Hearing Officer	29	1	30
*Preliminary Decisions	8	0	8
*Correcting Decisions	16	0	16
Total All Decisions by Category	**850**	**4**	**854**
Total Final Decisions	**826**	**4**	**830**

* Preliminary and Correcting Decisions do not reduce the number of appeals outstanding.

CHART 7B



Mode of Hearing

CHART 8A

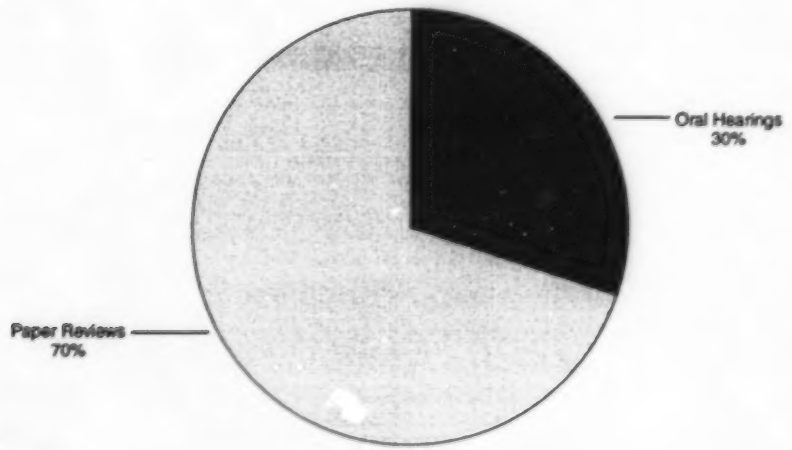
Month Decision Resolved	OHR/OHG	OHR/PRG	PRR/OHG	PRR/PRG	Total by Month
April 2001	13	21	1	20	55
May 2001	10	27	0	29	66
June 2001	19	16	2	26	63
July 2001	14	25	1	27	67
August 2001	9	16	0	34	59
September 2001	15	18	2	18	53
October 2001	24	16	1	20	61
November 2001	29	27	3	30	89
December 2001	22	22	2	25	71
January 2002	20	28	2	37	87
February 2002	23	29	1	19	72
March 2002	34	23	3	27	87
Totals by Type	**232**	**268**	**18**	**312**	**830**

Legend:

OHR - Oral Hearing Requested
OHG - Oral Hearing Granted
PRR - Paper Review Requested
PRG - Paper Review Granted

CHART 8B

Appeal Hearings

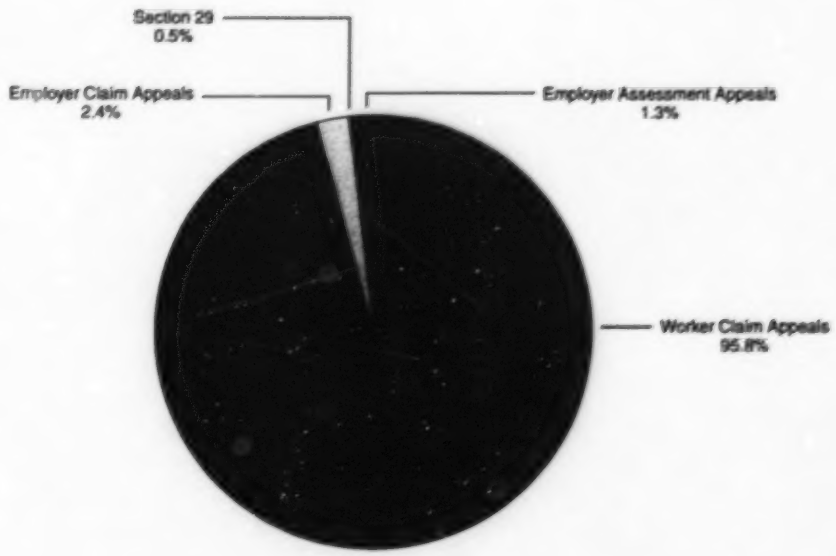


Decisions by Appellant Type

	Paper Review	Oral Hearing	Total Appeals
Worker Claim Appeals	567	228	795
Employer Claim Appeals	8	12	20
Employer Assessment Appeals	5	6	11
Section 29, third-party applications	0	4	4
Total Appeal Decisions	**580**	**250**	**830**

CHART 9A

CHART 9B

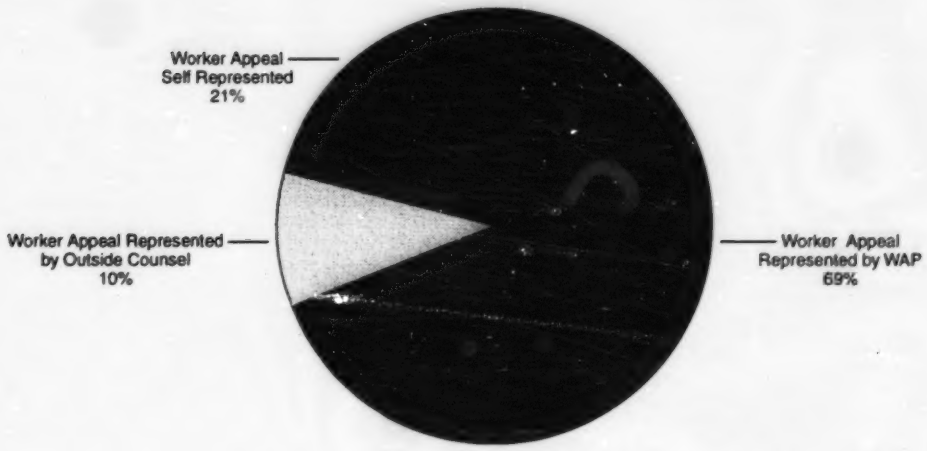


Decisions by Representation

CHART 10A

Decisions by Appellant Type and Representation	Paper Review	Oral Hearing	Total Appeals
Worker appeals represented by WAP	400	155	555
Worker appeals represented by outside counsel	43	34	77
Worker appeals self-represented	124	39	163
Section 29 Third Party Applications	0	4	4
Employer appeals worker represented by WAP	5	4	9
Employer appeals worker represented by outside counsel	2	1	3
Employer appeals worker self-represented	1	7	8
Employer assessment appeal employer represented	4	5	9
Employer assessment appeal employer self-represented	1	1	2
Total Appeal Decisions	**580**	**250**	**830**

CHART 10B


Worker Appeal Self Represented 21%
Worker Appeal Represented by Outside Counsel 10%
Worker Appeal Represented by WAP 69%

Appeals and Judicial Review Proceedings from WCAT Decisions

CHART 11

	Appeals	Judicial Reviews	All Proceedings
Adjourned Matters	—	—	96
Active Matters	—	—	29
Proceedings from Previous Year			125
New Appeals/Applications	—	—	144
Subtotal	—	—	269
Dispositions			
Allowed	4	1	5
Dismissed	5	0	5
Decisions on the merits	9	1	10
Remittances by Consent	11	1	12
Discontinuances	11	1	12
Subtotal	31	3	34
Adjournments			
CP	182	1	183
GECA	28	22	50
SCC (CP)	—	—	2
Subtotal	210	23	235
Active Proceedings	9		9